Argentina – Definitive Safeguard Measure on Imports of Preserved Peaches

(WT/DS238)

Third-Party Submission of the United States

June 20, 2002

Table of Contents

I. Introduction

1. The United States welcomes the opportunity to present its views in this proceeding on *Argentina – Definitive Safeguard Measure on Imports of Preserved Peaches* (DS238). The United States is limiting its comments to certain issues relating to the proper legal interpretation of the *Agreement on Safeguards* (the "Safeguards Agreement").[1]

II. A Contracting Party Should Generally Examine Relevant Data from its Entire Standard Review Period to Provide Objectivity in its Analyses of Import Volume

2. Chile argues that Argentina failed to demonstrate that preserved peaches were being imported "in such increased quantities, absolute or relative to domestic production, and under such conditions" as to cause or threaten to cause serious injury. It bases its argument in part on the grounds that the competent authority for Argentina, the National Foreign Trade Commission ("CNCE"), considered five years of import data in its analysis of increased imports in absolute terms, but only four years of data in its analysis of increased imports in relative terms.[2] The United States takes no position regarding the adequacy of Argentina's approach to this issue in the challenged investigation. The United States does wish, however, to make certain observations regarding the "increased imports" requirement for applying a safeguard measure.

3. The Safeguards Agreement does not establish any particular methodology or analytic framework for evaluating increased imports. Article 2.1 merely states that a competent authority must determine "pursuant to" the other provisions of the Safeguards Agreement that imports are taking place "in such increased quantities, absolute or relative to domestic production . . . as to cause or threaten to cause serious injury to the domestic industry." Article 4.2 (a), in turn, simply states that competent authorities shall evaluate all relevant factors of an "objective and quantifiable nature" having a bearing on the situation of the industry, including "the rate and amount of increase in imports of the product concerned in absolute and relative terms."

4. In *United States – Lamb Meat*, however, the Appellate Body stated that a competent authority "should not consider [the most recent] data in isolation from the data pertaining to the entire period of investigation." The Appellate Body further stated that "in conducting their evaluation under Article 4.2(a), competent authorities cannot rely exclusively on data from the most recent past, but must assess that data in the context of the data for the entire investigative period."[3] These statements support the conclusion that a competent authority should generally examine *all* of the data that it has collected for the *entire* investigative period, provided that the

---

[1] The United States has not had an opportunity to review fully Argentina's written submission in this dispute and is therefore limiting itself to addressing Chile's written submission at this time. The United States will address Argentina's written submission, as appropriate, at the first Panel meeting.

[2] Chile's first written submission, para. 4.22.

[3] Report of the Appellate Body on *United States - Safeguard Measures on Imports of Fresh, Chilled and Frozen Lamb Meat from New Zealand and Australia,* WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, para. 138 (*"United States – Lamb Meat (AB)"*).

data is reliable and useable and that there are no circumstances indicating that examination of a different time period would be appropriate.[4]

5. As noted above, the United States takes no position regarding Argentina's approach to this issue in the challenged investigation. As a general matter, however, the United States respectfully submits that a competent authority's decision to vary the time periods for its evaluation of injury factors, depending on the factor being considered, may call into question the objectivity of the competent authority's analysis.

III. The Panel Should Decline to Consider Extra-Record Evidence That Was Not Before the Competent Authority

6. In challenging Argentina's analysis of increased imports, Chile cites tables containing data on apparent consumption of preserved peaches for the years 1994 to 1996 drawn from a study that CNCE prepared in 1998.[5] It is not clear to the United States whether the study was made part of the administrative record in the investigation that is the subject of this dispute. Judging from Chile's submission, however, the data appear to have been gathered for a different investigation regarding exports of peaches from the European Union.[6]

7. To the extent that this study was not part of the record before CNCE in the challenged investigation, the Panel should disregard it. It is a fundamental aspect of the standard of review of competent authorities' determinations in safeguard investigations that the review of those determinations be based on the record that was before the competent authorities, and not on extra-record evidence. In *United States – Wheat Gluten,* the panel concluded that "it is for the USITC to determine how to collect and evaluate data and how to assess and weigh the relevant factors in making determinations of serious injury and causation." That panel stressed that "[i]t is not our role to collect new data, or to consider evidence which could have been presented to the USITC by interested parties in the investigation, but was not."[7] The panel in *United States – Hot Rolled Steel* reached a similar conclusion concerning extra record information based on its analysis of the requirements of Article 11 of the DSU.[8] If a panel considers new information that was not before the competent authority, the panel would be weighing these new facts against the

---

[4] The types of circumstances that would indicate that a different time period is appropriate will vary depending on conditions of competition specific to the industry.

[5] Chile's first written submission, para. 4.24.

[6] *See* footnote 23 of Chile's first written submission, which describes the study and states that it was part of a file relating to a study of whether exports of peaches from the European Union were being subsidized or dumped.

[7] Report of the Panel on *United States - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities,* WT/DS166/R, adopted 19 January 2001, para. 8.6 ("*United States – Wheat Gluten (Panel)*").

[8] Report of the Panel on *United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan,* WT/DS184/R, adopted 23 August 2001, para. 7.7.

evidence already on the record. The Appellate Body has found that panels are not entitled to conduct such *de novo* reviews.[9]

IV. The Safeguards Agreement Does Not Mandate a Three-Stage Approach to Non-Attribution

8. In paragraph 4.74 of its first written submission, Chile argues that "[f]or an analysis of causal link to be consistent with Articles 2 and 4.2(b) of the [Agreement], the methodology adopted by the investigating authorities must consist of a three-stage approach that complies with the so-called principle of non-attribution of injurious effects of other factors." Contrary to Chile's assertion, the Safeguards Agreement does not require such a three-stage approach.

9. In *United States – Lamb Meat*, the Appellate Body referenced the same passage from *United States – Wheat Gluten* that Chile relies upon and clarified that the "three-stage approach" is not required. The Appellate Body stated that the three steps simply describe "a logical process for complying with the obligations relating to causation" in Article 4.2(b). It emphasized that the steps are not legal "tests" mandated by Safeguards Agreement, and that it was not imperative that each step "be the subject of a separate finding or a reasoned conclusion by the competent authorities." The Appellate Body also noted that the Safeguards Agreement does not specify any particular method for separating the effects of increased imports and the effects of other causal factors.[10]

10. Accordingly, there is no basis for Chile's assertion that the Safeguards Agreements requires Members to apply a three-stage approach in assessing causation.

V. The Safeguards Agreement Does Not Require Competent Authorities to Demonstrate that Imports Alone Caused a Degree of Injury that is "Serious"

11. In paragraph 4.78 of its first written submission, Chile argues that Argentina failed to demonstrate that after the threat of injury from other factors had been discounted, the threat of injury from increased imports alone reached the threshold of "serious" injury. Article 4.2(b) does not require a competent authority to demonstrate that imports, standing alone, caused a degree of injury that was "serious."

12. In *Wheat Gluten*, the Appellate Body made clear that increased imports need not be the sole cause of the injury. The Appellate Body stated that "the language of Article 4.2(b), as a whole, suggests that "the causal link" between increased imports and serious injury may exist, *even though other factors are also contributing, "at the same time", to the situation of the*

---

[9] *United States - Lamb Meat (AB),* para.106.

[10] *See United States – Lamb Meat (AB),* paras. 178, 181.

domestic industry."[11] Similarly, in *United States – Lamb Meat*, the Appellate Body stated that the Safeguards Agreement "does not require that increased imports be 'sufficient' to cause, *or threaten to cause*, serious injury. Nor does the Agreement require that increased imports 'alone' be capable of causing, *or threatening to cause*, serious injury."[12] Finally, in *United States – Line Pipe,* the Appellate Body explained that "the causation requirement of Article 4.2(b) can be met where the serious injury is caused by the interplay of increased imports and other factors," and that "to meet the causation requirement in Article 4.2(b), it is not necessary to show the increased imports alone – on their own – must be capable of causing serious injury."[13]

13. Accordingly, there is no basis for Chile's assertion that Members' competent authorities are required to demonstrate that increased imports alone threaten "serious" injury.

VI. Current Facts May Support Threat of Serious Injury Determinations

14. In paragraphs 4.68 and 4.69 of its first written submission Chile argues that CNCE impermissibly based its finding of threat of serious injury on the fact that there were no indications that current international market conditions, regarding the volume and price of world production and exports of preserved peaches, would change in the imminent future. Chile argues that CNCE's threat analysis was based on conjecture or remote possibility and not on facts.

15. The Appellate Body has analyzed threat of serious injury as encompassing a lower threshold than serious injury and has found that there is often "a continuous progression of injurious effects eventually rising and culminating in what can be determined to be 'serious injury,'" since "[s]erious injury does not generally occur suddenly."[14] The Appellate Body has concluded that in drafting the Safeguards Agreement, Members defined threat of serious injury separately from serious injury so that an importing Member could act sooner to take preventive action when increased imports posed a threat of serious injury.[15]

16. In the view of the United States, current facts *can* support a finding by a competent authority that there is a threat of serious injury under the Appellate Body's analysis. Nothing in the Safeguards Agreement prohibits a competent authority from basing a threat of serious injury determination on current facts which, if continued, will result in serious injury, coupled with a finding that nothing in the record indicates that such facts will change in the imminent future.

---

[11] *See United States – Wheat Gluten (AB),* para. 67 (emphasis in original).

[12] *United States – Lamb Meat (AB),* para. 170 (emphasis added).

[13] Report of the Appellate Body on *United States - Definitive Safeguard Measures on imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002, para. 209 ("*United States – Line Pipe (AB)*").

[14] *United States – Line Pipe (AB),* paras. 168 and 169.

[15] *United States – Line Pipe (AB),* para. 169.

VII. There Is No Basis in the Text of the Safeguards Agreement for "Presuming" a Breach of Article 5.1

17. Chile states that a Member that establishes an inconsistency with Article 4.2(b) of the Safeguards Agreement also establishes a presumption of inconsistency with Article 5.1 of the Safeguards Agreement.[16] There is no reference to such a presumption in Article 4.2(b) or Article 5.1, and there is no basis for reading one into the text.

18. The Appellate Body has made it clear on numerous occasions that the rights and obligations of WTO Members are to be found in the actual text of the WTO Agreement, and not in layers of interpretation that are read into that text. As they have stated:

> The legitimate expectations of the parties to a treaty are reflected in the language of the treaty itself. The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the *Vienna Convention*. But these principles of interpretation *neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended.*[17]

19. The Appellate Body's guidance is particularly apt in this case, because other provisions of the WTO Agreements do contain provisions that establish presumptions. For example, Article 3.8 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU") states that "[i]n cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment." Similarly, Article 2.4 of the *Agreement on the Application of Sanitary and Phytosanitary Measures* (the "SPS Agreement") states that "[s]anitary or phytosanitary measures which conform to the relevant provisions of this Agreement *shall be presumed* to be in accordance with the obligations of the Members under the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures . . . ."[18] Article 2.5 of the *Agreement on Technical Barriers to Trade* (the "TBT Agreement") states that "[w]henever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2 . . . it *shall be rebuttably presumed* not to create an unnecessary obstacle to international trade."[19] And Article 16.1 of the *Agreement on Trade-Related Aspects*

---

[16] Chile's first written submission, para. 4.104.

[17] Appellate Body Report on *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 2 September 1998, para. 45 (emphasis added).

[18] Emphasis added. *See also* Article 3.2 of the SPS Agreement (stating that "[s]anitary or phytosanitary measures which conform to international standards . . . shall be deemed to be necessary . . . and *presumed* to be consistent with the relevant provisions of this Agreement and of GATT 1994.") (emphasis added).

[19] Emphasis added.

of Intellectual Property Rights (the "TRIPS Agreement") states that "[i]n case of the use of an identical sign for identical goods or services, a likelihood of confusion *shall be presumed.*"[20]

20. These excerpts demonstrate that when the WTO drafters intended to create presumptions in the agreements, they did so explicitly. There is no reference to a presumption in Article 4.2(b) or Article 5.1, and such presumptions may not be imputed into the Safeguards Agreement.[21]

VIII. Chile's Challenge to the Extent of Application of the Measure

21. Chile's challenge to the extent of application of the safeguard measure is limited to just two paragraphs. In paragraph 4.107, Chile asserts that the measure imposed an extra 70 percent on the customs duties applicable to Chilean imports.[22] Then, in paragraph 4.108, Chile asserts that the duty amounted to an import prohibition, citing an alleged halt in imports of Chilean product after the safeguard measure was imposed.

22. As noted previously, the United States takes no position on the question whether Argentina has applied the safeguard measure consistently with Article 5.1. Nonetheless, the United States questions whether Chile's arguments are sufficient to meet its initial burden of making a *prima facie* case. For example, merely noting that imports stopped after the safeguard measure was imposed does not necessarily prove that the safeguard measure was responsible.

23. Even more important, Chile's arguments fail to address the central issue, which is whether a prohibitive tariff (assuming the tariff was prohibitive) went beyond what was necessary under the facts of this particular case. Depending on the facts underlying a particular safeguard action, it is possible that such an approach would be appropriate.[23] Chile has not addressed this issue.

IX. Conclusion

24. The United States thanks the Panel for providing an opportunity to comment on the issues at stake in this proceeding, and hopes that its comments will prove to be useful.

---

[20] Emphasis added.

[21] Chile also claims (in para. 4.102) that Article 5.1 "embodies the so-called principle of proportionality . . . ." In actuality, there is no "proportionality" test under Article 5.1. The term "proportional" is never used in Article 5.1, and there is no textual basis for reading it into that article.

[22] Chile asserts that the rate dropped to 63 percent in January, 2002. Chile's first written submission, para. 4.107.

[23] The nature and extent of the serious injury to the industry and the duration of the measure are examples of factors that might be relevant to reviewing such a determination.